

Internal Revenue Service
memorandum

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Br4:GBFleming

date: MAR 10 1989
to: District Counsel, Dallas SW:DAL
Attention: Mark Barta
from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject:

[REDACTED]
Request for Tax Litigation Advice

This responds to your memorandum of December 12, 1988, requesting advice concerning interest on overpayments of windfall profit tax. We have coordinated our response informally with Income Tax and Accounting (CC:IT&A) and have requested formal coordination, which will be completed at a later date. We will advise you if the views of CC:IT&A vary from the analysis set forth in this memorandum.

ISSUE

Whether a taxpayer is entitled to statutory interest on an overpayment of windfall profit tax ("WPT") that the taxpayer elects on the quarterly excise tax return (Form 720) to apply on its windfall profit tax liability for the next quarter.

CONCLUSION

Your memorandum suggests that the taxpayer is not entitled to interest on overpayments applied to the next quarterly return, based on an analogy to regulations that apply to the income tax. In this regard, Treas. Reg. § 1.6166-1(h)(2)(vii) provides that a taxpayer electing to apply an overpayment to its estimated tax for a later year receives no interest on the overpayment. Although this provision has been sustained in court in the context of the income tax, we do not believe that it applies generally to other taxes or specifically to the windfall profit tax.

Rather than the income tax provision suggested in your memorandum, Treas. Reg. § 1.6166-1(h)(2)(iii) governs the crediting of WPT overpayments to the next quarter. Under that provision, the period for calculating interest runs from the due date of the return to the earlier of the date on which the schedule for allowance of the credit is signed or the due date for the return for the next quarter. In most cases, the

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credit is applied as of the due date of the return on which the credit is claimed. By interpreting the date on which the schedule of allowance is signed to mean the date as of which the credit is applied, the period for calculating interest begins and ends on the same date. Thus, as a practical matter, no interest is due where the credit is applied as of the due date of the return for the previous taxable period.

FACTS

The taxpayer, [REDACTED], is an integrated oil company which produced crude oil that was not subject to WPT withholding. In accordance with I.R.C. § 4995(b)(1) and Treas. Reg. § 51.4995-3(a), [REDACTED] made semimonthly deposits of the estimated amount of its WPT liability and the amount of WPT withheld as the first purchaser from other producers. Pursuant to Treas. Reg. § 51.4997-1(a)(1), [REDACTED] also filed quarterly excise tax returns on Form 720.

On some of its returns, [REDACTED]'s total deposits, including credits for previous WPT overpayments, exceeded its WPT liability for the taxable period. Where that occurred, [REDACTED] elected to have the excess applied to its next return rather than refunded.

In accordance with [REDACTED]'s election, the Windfall Profit Tax Unit of the [REDACTED] applied these excess amounts to [REDACTED]'s succeeding returns but, following its normal practice, did not allow any interest on the overpayments. [REDACTED] has filed a claim against the United States in the United States Claims Court, pursuant to 28 U.S.C. § 2410(a), seeking statutory interest on the overpayments of WPT that it elected to apply to succeeding taxable periods. The amount of the claim is \$ [REDACTED], plus interest, for taxable periods beginning [REDACTED] and ending [REDACTED].

APPLICABLE LAW

I.R.C. § 4995(b)(1) and Treas. Reg. § 51.4995-3(a) require an integrated oil company to make semimonthly deposits of (1) its own WPT liability imposed by I.R.C. § 4986 on the removal in that semimonthly period of crude oil that is not subject to withholding and (2) the amount of WPT withheld as first purchaser from other producers during the semimonthly period.

Treas. Reg. § 51.4995-3(g)(2) provides that any overdeposit of tax shall be applied in order of time to each of the producer's succeeding semimonthly periods to the extent that the amount by which the total liability for that period

exceeds the deposit for such subsequent period, until such excess is exhausted. This provision does not apply, however, to any amount for which the producer files a claim for credit against a liability for income tax or a claim for refund pursuant to § 51.6402-1 of the regulations. Furthermore, except to the extent otherwise provided in forms and instructions, no amount shall be applied to a deposit for a subsequent semimonthly period that occurs in a taxable period beginning in a different taxable year (for Federal income tax purposes).

I.R.C. § 4997(a) requires each taxpayer that is liable for WPT under section 4986 to make such returns as the Secretary may prescribe by regulations. Treas. Reg. § 51.4997-1(a)(1) requires an integrated oil company to file a quarterly return (on Form 720, with Form 6047 attached, in accordance with the instructions on those forms).

I.R.C. § 6402(b) authorizes the Secretary to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

Treas. Reg. § 301.6402-3(a)(5) provides that a corporation's properly executed original or amended income tax return shall constitute a claim for refund or credit for the amount of the overpayment disclosed by the return. That section further provides that if the taxpayer indicates on its return or amended return that all or part of the overpayment shown by that return is to be applied to its estimated income tax for its succeeding taxable year, such indication shall constitute an election to so apply such overpayment, and no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

Treas. Reg. § 51.6402-1(b) provides rules governing claims by purchasers and producers depositing tax, for the refund or credit of WPT overpayments. Under that provision, an integrated oil company that has paid more than the sum required to be deposited as a purchaser plus the amount of tax imposed by section 4986 on the removal in that taxable period of crude oil not subject to withholding may claim credit for such overpayment against any liability for a tax imposed by chapter 1 [income tax] or 45 [WPT] in accordance with the forms and instructions provided for that purpose.

I.R.C. § 6513(a) provides that a return filed before the last day prescribed for the filing thereof or a payment of any

portion of a tax before the last described for the payment of the tax shall be considered filed or made on such last day.

I.R.C. § 6611(a) provides that interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

I.R.C. § 6611((b)(1) and Treas. Reg. § 301.6611-1(h)(1) provide that interest shall be allowed and paid on a credit from the date of the overpayment to the due date of the amount against which the credit is taken. Treas. Reg. § 301.6611-1(d) provides that in the case of an advance payment the date of overpayment is determined in accordance with the rules of I.R.C. § 6513. Treas. Reg. § 301.6611-1(h)(2)(i) provides, in general, that "due date" means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time). Section 301.6611-1(h)(2)(iii) provides, however, that if a taxpayer agrees to the crediting of an overpayment against tax or an installment of tax and the schedule of allowance is signed prior to the date on which such tax or installment would otherwise become due, the due date of such tax shall be the date on which such schedule is signed.

Treas. Reg. § 301.6611-1(h)(2)(vii) provides that if a taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

ANALYSIS

The general rule of I.R.C. § 6611 and Treas. Reg. § 301.6611-1(h), in the case where an overpayment is credited, is that interest shall be allowed on any overpayment of any tax from the date of overpayment of the tax to the due date of the amount against which such overpayment is credited. For this purpose, the date of overpayment is the due date of the quarterly return that shows the overpayment. See Treas. Reg. § 301.6611-1(d) (incorporating the rules of I.R.C. § 6513). Thus, under this general rule, [REDACTED] would appear to be entitled to interest from the due date for the quarterly return to the due date of the next quarterly return.

There are, however, two limitations on this general rule that should be considered with respect to [REDACTED]'s claim for interest. The first, discussed in your memorandum, is the rule providing that no interest is allowed on an overpayment

of income tax that is applied to the taxpayer's estimated income tax for the next taxable period. The other limitation, contained in Treas. Reg. § 301.6611-1(h)(2)(iii), provides that the period over which interest is calculated may be reduced under certain circumstances. The following discussion analyzes the applicability of each of these limitations to [REDACTED]'s claim.

1. Income Tax Analogy

Under Treas. Reg. §§ 301.6402-3(a)(5) and 301.6611-1(h)(2)(vii), no interest is allowed on the portion of an overpayment that a taxpayer elects on his income tax return to apply to his estimated income tax for the succeeding taxable year. The courts have sustained the validity and application of this rule. See Owens-Corning Fiberglass Corp. v. United States, 462 F.2d 1139 (Ct. Cl. 1972). The WPT Unit cited this income tax rule when it informed [REDACTED] that no interest would be allowed on overpayments which [REDACTED] elected to apply on its WPT liability for succeeding taxable periods. Your memorandum recognizes that the cited rule applies specifically to income tax but suggests that the underlying rationale, as set forth in Owens-Corning, is applicable to this case to support the WPT Unit's determination not to allow interest on [REDACTED]'s overpayments.

We agree that [REDACTED]'s election to apply the overpayments shown on its quarterly Form 720 to its WPT liability for the succeeding quarter appears to be similar to a taxpayer's election to apply an overpayment shown on its income tax return to its estimated income tax for the next taxable period. We believe, however, that the rule embodied in sections 301.6402-3(a)(5) and 301.6611-1(h)(2)(vii) is applicable only to income tax and cannot be applied by analogy to other taxes such as the WPT.

Section 301.6611-1(h)(2)(vii) carves out an administrative exception to the general rule enunciated in section 6611 allowing interest on an overpayment from the date of the overpayment to the due date of the amount against which the credit is taken. Section 301.6611-1(h)(2)(vii) was promulgated by T.D. 6234, 1957-1 C.B. 441, and is substantially the same as language found in section 301.6402-3(b), which was originally promulgated by T.D. 5333, 1944 C.B. 358.

As the court discussed in Owens-Corning, *supra*, 462 F.2d at 1140, the predecessor of section 6402(b) authorized regulations providing for the crediting of overpayments of income tax against estimated income tax payments for the succeeding year. The legislative history of that provision

stated that such regulations should specify "the terms, conditions, extent, and effect of the credit" and, in particular, "whether and to what extent and under what conditions the taxpayer shall be allowed to take the credit on his declaration." S. Rept. No. 221, 78th Cong., 1st Sess. 33 (1943), 1943 C.B. 1338-39. In upholding the validity of the no-interest rule of section 301.6611-1(h)(2)(vii), the Owens-Corning court treated it as a restatement of the earlier rule of section 301.6402-3(b) and found that it is a reasonable condition on the exercise of a taxpayer's privilege to apply an overpayment against its estimated income tax for the succeeding year.

There is an obvious similarity between an election to apply a WPT overpayment to a taxpayer's WPT liability for the next quarter and the election to apply an income tax overpayment to the taxpayer's estimated income tax for the next taxable year. That similarity might suggest that the same no-interest rule should apply in the case of the WPT as in the case of income tax. Although such a result might be reasonable, we do not believe that the no-interest rule for income tax can be applied by analogy to the WPT.

As previously noted, the no-interest rule of section 301.6611-1(h)(2)(vii) is an exception to the general rule allowing interest on overpayments. The foregoing history of the rule demonstrates that it is grounded in the specific grant of authority in section 6402(b), which relates solely to the crediting of income tax overpayments against estimated income tax for the succeeding taxable year. For that reason, we believe that a court would interpret the provision narrowly as applying solely to income taxes and would not sustain an analogous no-interest rule for WPT cases in the absence of a directly applicable provision in the Code or the regulations.

Because the no-interest rule of section 301.6611-1(h)(2)(vii) does not apply in this case, we believe that, as a technical matter, the general rule allowing interest on overpayments will apply. As discussed below, however, another provision of the regulations supports the determination not to allow [REDACTED]'s claim for interest.

2. Interest Period

Under the general rule of Treas. Reg. §§ 301.6611-1(a) and (h)(2), any interest to which [REDACTED] may be entitled in this case would run from the date of the overpayment to the due date of the amount against which the credit is applied. The date of overpayment would be the last day provided for the payment of the tax, i.e., the due date for the quarterly

return. See, I.R.C. § 6513(a); Rev. Rul. 84-168, 1984-2 C.B. 308.

Section 301.6611-1(h)(2) sets forth rules for determining the due date of the tax against which the credit is applied. Of particular interest in this case is section 301.6611-1(h)(2)(iii), which provides that if the schedule of allowance is signed prior to the date on which the tax would otherwise become due, then the due date of such tax is the date on which the schedule is signed. The reference to the "schedule of allowance" is apparently a vestige of procedures that were followed prior to the Service's use of computers. Under those procedures, the signing of a schedule showing overassessments was required before a credit or refund could be granted. We have learned in discussions with the WPT Unit that current procedures do not include the signing of a "schedule of allowance." Instead, a credit is considered scheduled as of the transaction date of the credit shown on the taxpayer's account. We believe, therefore, that the date as of which credit is applied should be equivalent to "the date on which such schedule was signed" for purposes of section 301.6611-1(h)(2)(iii).

In the case of [REDACTED]'s WPT overpayments, the transcripts of account show that the transaction date of the credit generally coincided with the due date of the quarterly return on which [REDACTED] elected to apply the overpayment to the next return. This means that under the interpretation of section 301.6611-1(h)(2)(iii) discussed above, the date of [REDACTED]'s overpayment and the due date of the tax against which the credit was applied are generally identical. Thus, interest would be calculated over a period of zero days, yielding no interest. We believe that this definition of due date is properly applicable in this case and, accordingly, that the WPT Unit was correct in not allowing interest on [REDACTED]'s WPT overpayments where the credit was applied as of the due date of the previous quarterly return. ^{1/}

We note that the interest calculations attached to [REDACTED]'s amended complaint in the Claims Court action indicate that [REDACTED] apparently believes that a different method of

^{1/} It is not clear from the transcripts that the overpayment was applied in all cases as of the due date of overpayment. If there are instances where the credit was applied at a later date, interest should be allowed from the date of overpayment to the date as of which the credit was applied. It may be necessary for the WPT Unit to review this matter to determine whether there are any taxable periods for which [REDACTED] is entitled to any interest.

determining the interest period should apply. [REDACTED] seeks interest from the date of overpayment to the date of the semimonthly deposit on which the credit (or a portion of the credit) is used. In some instances, it took several semimonthly deposits before [REDACTED] exhausted the entire amount of the credit.


It appears that [REDACTED]'s calculations may be based on the provision in Treas. Reg. § 51.4995-3(g)(2) regarding the treatment of overdeposits. Under that section, an overdeposit should be applied in order of time to each succeeding semimonthly period to the extent that the total deposit liability for that period exceeds the deposit for such subsequent period, until the excess is exhausted. Although this rule is applicable for determining whether a taxpayer is subject to penalties under I.R.C. § 6656 for underdepositing WPT, we do not believe that there is any basis for using it to determine the period over which interest runs for purposes of section 6611. ^{2/}

In summary, we do not believe that a court would sustain the application of Treas. Reg. § 301.6611-1(h)(2)(vii) in this case as a basis for not allowing interest on [REDACTED]'s overpayment. Nevertheless, using the definition of due date in Treas. Reg. § 301.6611-1(h)(2)(iii), [REDACTED] was not entitled to any interest where the credit was applied as of the date of overpayment.

Please contact Gerald Fleming at FTS 566-3345 if you have any questions concerning this matter.

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^{2/} We note that LTR 84-31-078 (May 3, 1984) suggests that interest would run from the date of overpayment to the date of the deposit against which the credit is applied. We believe that the ruling is incorrect on this point. In any event, because the ruling was issued to another taxpayer, [REDACTED] is not entitled to rely on it.